

**United States Department of Labor
Employees' Compensation Appeals Board**

K.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Port Huron, MI, Employer**

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**Docket No. 16-1880
Issued: July 24, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 22, 2016 appellant, through counsel, filed a timely appeal from an August 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs² (OWCP). As more than 180 days elapsed from the last merit decision, dated May 5, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that appellant, through counsel, specifically appealed only OWCP's August 12, 2016 nonmerit decision. Although the Board has jurisdiction over an OWCP hearing representative's May 5, 2016 merit decision which affirmed the denial of her claim for a recurrence of disability, appellant has not appealed that decision. Therefore, the Board has not addressed it in this appeal. *See* 20 C.F.R. § 501.3(a)(c).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel contends that OWCP did not properly consider new evidence submitted by appellant along with her request for reconsideration.

FACTUAL HISTORY

On January 29, 2013 appellant, then a 45-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that on January 23, 2013 she first became aware of her injury and first realized that it was caused by her federal employment as she had the same symptoms as a previous injury. In a January 30, 2013 narrative statement, she related that she was awakened by pain from her left shoulder to her fingertips. Appellant claimed that overreaching while casing mail caused her left hand to hit a case resulting in tingling in the hand.

By letter dated February 27, 2013, OWCP advised appellant of the deficiencies in her claim and requested that she submit additional factual and medical evidence. It afforded her 30 days to submit additional evidence and respond to its inquiries.

In a March 27, 2013 narrative statement, appellant related that a medical report from her physician regarding her left hand condition was forthcoming.

In a March 22, 2013 electromyogram (EMG) and nerve conduction velocity study, Dr. Geoffrey K. Seidel, a Board-certified physiatrist, provided an impression of an abnormal left upper extremity electrodiagnostic examination. He also provided an impression of electrodiagnostic evidence of median mononeuropathy/carpal tunnel syndrome. Dr. Seidel found no electrodiagnostic evidence of ulnar neuropathy at the elbow or cervical radiculopathy or plexopathy.

Appellant completed a medical questionnaire on March 22, 2013 regarding her medical and family history, hobbies, and exercise and sports activities.

In an April 2, 2013 decision, OWCP denied appellant's claim after finding that the evidence was insufficient to establish the claimed events. It noted that she had not submitted any factual evidence in response to its February 27, 2013 development letter. OWCP also found that the medical evidence of record did not contain a medical diagnosis in connection with an injury or events.

By letter dated April 9, 2013, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

In a February 25, 2013 medical report, Dr. Antonio Colombo, an attending Board-certified internist, noted that appellant's rural carrier position required repetitive use of her hand. He also noted her left arm and left hand symptoms which had worsened at work. Dr. Colombo reported findings on physical examination and diagnosed left hand pain and left hand carpal

tunnel syndrome. He advised that appellant's conditions were work related and concluded that she could work with restrictions.⁴

In a November 6, 2013 decision, an OWCP hearing representative modified the April 2, 2013 decision to reflect that the evidence of record was sufficient to establish that appellant performed the claimed work duties. However, he remanded the case to OWCP for further development of the medical evidence. The hearing representative found that, while Dr. Colombo's February 25, 2013 report was insufficient to discharge appellant's burden of proof to establish causal relationship, it was sufficient to require further medical development.

In a December 1, 2013 letter, Dr. Colombo advised that appellant's left carpal tunnel syndrome was based on an EMG. He opined that her condition was directly and causally related to her rural carrier position which involved repetitive use of her hands, particularly driving with her left hand.

On January 16, 2014 OWCP accepted appellant's claim for left carpal tunnel syndrome.

By letter dated January 21, 2014, OWCP advised Dr. Colombo that appellant had not returned to work since the filing of her claim. It requested that he submit a report addressing her work capacity.

In a December 23, 2013 report received on January 21, 2014, Dr. Colombo noted appellant's difficulty with performing her repetitive job duties due to her work-related left hand carpal tunnel syndrome. In a January 29, 2013 disability certificate, he reported that she had been unable to work commencing January 25, 2013. Dr. Colombo advised that appellant could return to work with restrictions on January 30, 2013.

On January 22 and 29, 2014 appellant filed claims for compensation (Forms CA-7) for leave without pay from January 23, 2013 to February 7, 2014.

By letter dated February 19, 2014, OWCP advised appellant that the medical evidence of record was insufficient to establish her occupational disease claim. It afforded her 30 days to submit additional medical evidence to establish disability causally related to her accepted work-related condition.

In a March 17, 2014 letter, Dr. Colombo reiterated that appellant's left hand carpal tunnel syndrome and left hand pain were work related. He advised that her limitations on lifting, reaching, pushing, pulling, and driving limited her ability to work. Dr. Colombo further advised that side effects from appellant's current medications, which included sedation and sleepiness that sometimes caused dizziness with sudden movement, blurry vision, fatigue, the need to sleep multiple times during the day, and occasional shortness of breath and light-headedness, which caused anxiety and her to pass out, resulted in her incapacity to work.

⁴ A March 6, 2013 letter and May 7, 2013 Notice of Personnel Action (Form SF-50) indicated that the employing establishment removed appellant from employment, effective April 15, 2013, for failure to adhere to attendance regulations and for being absent without leave.

In an April 9, 2014 report, Dr. Steven J. Heithoff, a Board-certified orthopedic surgeon, noted that he had previously performed right carpal tunnel release and that appellant had an excellent result. He also noted that she presented for treatment of her left carpal tunnel condition. Dr. Heithoff reviewed appellant's medical history and family and social background. He reported findings on physical and x-ray examination and provided an impression of grade 1 left carpal tunnel syndrome and pain in the left forearm joint. Dr. Heithoff proposed left carpal tunnel release.⁵ He indicated that Dr. Colombo had placed appellant off work and that the physician would continue to manage her work status.

By decision dated April 23, 2014, OWCP denied appellant's claim for a recurrence of disability from January 23, 2013 to February 7, 2014. It found that the medical evidence of record failed to establish that she was disabled during the claimed period as a result of her accepted employment injury. OWCP further found that the evidence of record was insufficient to establish that appellant's claimed disability was due to a change or withdrawal of her light-duty assignment.

By letter dated April 29, 2014, counsel requested a telephone hearing with an OWCP hearing representative.

In reports dated April 30 and September 3, 2014, Dr. Heithoff noted that appellant was postop of her April 18, 2014 left carpal tunnel release. He also noted her history, provided findings on examination, and reviewed prior diagnostic test results. Dr. Heithoff restated his impression of pain in the left forearm joint and left carpal tunnel syndrome. He also reiterated his finding regarding appellant's disability for work. Dr. Heithoff agreed with Dr. Colombo that she should be off work for 45 days following her April 18, 2014 surgery. He also reiterated this finding in a September 3, 2014 disability certificate. In a May 9, 2014 disability certificate, Dr. Heithoff advised that appellant could return to work on July 14, 2014.

In a January 30, 2015 decision, a second OWCP hearing representative set aside the April 23, 2014 decision and remanded the case to OWCP for further development of the medical evidence. She found that while Dr. Colombo's opinion regarding the cause of appellant's disability for work was insufficient to discharge appellant's burden of proof to establish a total disability during the claimed period, it was sufficient to require referral to a second opinion physician.

On April 29, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion.

In a May 15, 2015 report, Dr. Obianwu provided results of an examination conducted on that date. He reviewed appellant's medical record, the SOAF, and provided an accurate history of the accepted employment injury. Dr. Obianwu noted her current complaints of bilateral hand, elbow, wrist, and neck pain. He reported normal findings on examination of the left hand, left wrist, neck, bilateral shoulders, and elbows. Dr. Obianwu diagnosed resolved carpal tunnel

⁵ On April 30, 2014 OWCP authorized appellant's left carpal tunnel release which was performed on April 18, 2014 by Dr. Heithoff. Appellant received wage-loss compensation from April 21 to 30, 2014.

syndrome of the left wrist and hand, normal shoulder, and normal cervical spine. He explained that the left carpal tunnel syndrome had resolved as none of the provocative tests for making such a diagnosis was positive in the left hand. More importantly, there was no atrophy of the thenar eminence.

Dr. Obianwu maintained that there was no single objective finding that would lead any examiner to consider the presence of this entity. He found that there was no medical evidence to indicate that appellant was totally disabled from January 2013 to February 2014. Appellant had left carpal tunnel syndrome, but could work with restrictions. She had the same problem on the right side in 2011 and worked with restrictions until her surgery. Dr. Obianwu noted talk about dizziness and difficulty controlling appellant's steering, but found it difficult to see how carpal tunnel syndrome in one hand could be manifested by such a wide range in symptomatology as described by appellant. He found that she could perform her duties as a rural carrier without restrictions. Dr. Obianwu recommended that appellant wear wrist/forearm braces at night due to her surgery on both hands. He also recommended that she discontinue use of Norco as he did not find anything on her musculoskeletal examination to justify the use of this potent narcotic analgesic agent.

By decision dated June 5, 2015, OWCP denied appellant's claim for a recurrence of disability from January 23, 2013 through February 7, 2014. It found that Dr. Obianwu's referral opinion represented the weight of the medical evidence.⁶

On June 12, 2015 counsel requested a telephone hearing with an OWCP hearing representative.

In a May 5, 2016 decision, an OWCP hearing representative affirmed the June 5, 2015 decision. She found that Dr. Obianwu's report was sufficiently rationalized to establish that appellant did not sustain a recurrence of disability from January 23, 2013 to February 7, 2014 causally related to her accepted employment injury.

By letter dated May 16, 2016, counsel requested reconsideration and submitted medical evidence. In an undated letter, Dr. Colombo noted that, postoperatively, appellant related that she had weakness and occasional numbness in her left hand. As a result, appellant was unable to ride her bike. Dr. Colombo also noted that she had weakness in her left hand on a Jamar dynamometer testing, which was normal for her current age. He presumably disagreed with Dr. Obianwu's impression of a normal cervical spine, noting that a previous magnetic resonance imaging (MRI) scan had documented an abnormal cervical spine. Dr. Colombo also disagreed with his finding that appellant had no evidence of pathology and that a carpal tunnel could only be diagnosed on examination. He found that she still had weakness in her hand, which was one of her initial complaints, and her history was still positive for the condition. Dr. Colombo maintained that the only objective proof of the condition would be another EMG. He noted that appellant's job required her to lift boxes weighing 70 pounds and related that with her left hand strength being half of normal she should be restricted from performing such a task. Dr. Colombo

⁶ In an October 15, 2015 decision, OWCP granted appellant a schedule award for five percent permanent impairment of the left upper extremity.

concluded that Dr. Obianwu was unaware of her other medical problems, and thus, his comment regarding her pain medicine use was unfortunate.

In an August 12, 2016 decision, OWCP denied further merit review of appellant's claim. It found that her request for reconsideration did not raise substantive legal questions or include new and relevant evidence. OWCP found that Dr. Colombo's undated report was cumulative as he had made similar statements in his previous reports.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁸ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁹ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹⁰

ANALYSIS

The Board finds that OWCP improperly declined to reopen appellant's claim for consideration of the merits.

With her May 16, 2016 reconsideration request, appellant did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b).¹¹

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted Dr. Colombo's new undated report. In this report, Dr. Colombo provided rationale in support of his opinion, which disagreed with the opinion of Dr. Obianwu, that appellant was totally disabled from January 2013 to February 2014 due to her accepted work-related left carpal tunnel syndrome. Contrary to Dr. Obianwu's impression of a normal cervical spine, he noted that a previous MRI scan documented that appellant had an abnormal cervical spine.

⁷ *Supra* note 3. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

¹¹ *Id.* at § 10.606(b)(3).

Dr. Colombo noted that, while Dr. Obianwu found no evidence of pathology, he found weakness in appellant's hand on testing with a Jamar dynamometer, noting that this was one of her initial complaints and it had not resolved postsurgery. He recommended that she undergo another EMG as the only objective proof of her carpal tunnel condition. Dr. Colombo maintained that since appellant's left hand strength was only half of normal, she should be restricted from lifting 70-pound boxes at work. He further maintained that, Dr. Obianwu's comment regarding her pain medicine use was unfortunate as he was not aware of her other medical problems.

The Board finds that Dr. Colombo's report constitutes relevant and pertinent new evidence not previously considered by OWCP. Appellant's request for reconsideration met one of the standards for obtaining merit review of her case.¹² Accordingly, she is entitled to a merit review. The Board will, therefore, set aside OWCP's August 12, 2016 decision and remand the case for an appropriate merit decision on appellant's recurrence claim.

On appeal, counsel contends that OWCP did not properly consider new evidence submitted by appellant along with her request for reconsideration. For the reasons stated above, the case will be remanded to OWCP for issuance of an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹² L.Y., Docket No. 15-1344 (issued March 10, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: July 24, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board